No. 79-1959

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IN THE

Supreme Court of the United States

October Term, 1979

In re BEEF INDUSTRY ANTITRUST LITIGATION,
MDL DOCKET No. 248

MEAT PRICE INVESTIGATORS ASSOCIATION,
ET AL.,

Petitioners,

vs.

SAFEWAY STORES, INC., ET AL.,

Respondents,

and

RONALD BECKER, ET AL.,

Petitioners,

vs.

SAFEWAY STORES, INC., ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The following cases were consolidated for pretrial purposes by the Judicial Panel on Multidistrict Litigation as *In re Beef Industry Antitrust Litigation* (Supermarkets) and transferred to the Honorable William M. Taylor, Jr., Judge of the United States District Court for the Northern District of Texas, Dallas Division, pursuant to 28 U.S.C. § 1407, and they were consolidated for the purposes of appeal to the United States Court of Appeals for the Fifth Circuit:

PONY CREEK CATTLE CO., et al.,
Plaintiffs-Appellants,
MUSSELMAN RANCH CO., et al.,
Plaintiffs-Intervenors-Appellants,
v.
THE GREAT ATLANTIC & PACIFIC TEA CO., et al.,
Defendants-Appellees.

No. CA 3-75-0702-C (N.D. Tex. June 5, 1975)

R. DIRK AGEE, et al.,
Plaintiffs-Appellants,
v.
SAFEWAY STORES, INC., et al.,
Defendants-Appellees.

No. CA 3-76-1237-C (N.D. Tex. September 7, 1976)

MEAT PRICE INVESTIGATORS ASSOC., et al.,
Plaintiffs-Appellants-Petitioners,
v.
SAFEWAY STORES, INC., et al.,
Defendants-Appellees-Respondents.

No. CA 3-76-1238-C (N.D. Tex. September 7, 1976)

RICHARD S. LOWE, et al.,
Plaintiffs-Appellants,

v.

SAFEWAY STORES, INC., et al.,
Defendants-Appellees.

No. CA 3-76-1244-C (N.D. Tex. September 7, 1976)

A. I. BLACK, et al.,
Plaintiffs-Appellants,

v.

ALBERTSON'S, INC., et al.,
Defendants-Appellees.

No. CA 3-76-1248-C (N.D. Tex. September 7, 1976)

CHAPARRAL CATTLE CORP., et al.,
Plaintiffs-Appellants,

v.

SAFEWAY STORES, INC., et al.,
Defendants-Appellees.

No. CA 3-76-1253-C (N.D. Tex. September 7, 1976)

BURKE PETERSEN, et al.,
Plaintiffs-Appellants,

v.

SAFEWAY STORES, INC., et al.,
Defendants-Appellees.

No. CA 3-76-1254-C (N.D. Tex. September 7, 1976)

RONALD BECKER, et al., on behalf of themselves and all other persons similarly situated,
Plaintiffs-Appellants-Petitioners,

v.

SAFEWAY STORES, INC., et al.,
Defendants-Appellees-Respondents.

No. CA 3-76-1361 (N.D. Tex. September 7, 1976)

JOHN O. VARIAN, et al.,
Plaintiffs-Appellants,

v.

SAFEWAY STORES, INC., et al.,
Defendants-Appellees.

No. CA 3-76-1470-C (N.D. Tex. November 8, 1976)

MEAT PRICE INVESTIGATORS ASSOC., et al.,
Plaintiffs-Appellants-Petitioners,

v.

SAFEWAY STORES, INC., et al.,
Defendants-Appellees-Respondents.

No. CA 3-77-0361 (N.D. Tex. March 16, 1977)

LITTLE RANCH CO., et al.,
Plaintiffs-Appellants,

v.

THE NATIONAL ASSOCIATION OF FOOD CHAINS, et al.,
Defendants-Appellees.

No. CA 3-77-0362-C (N.D. Tex. March 16, 1977)

RONALD BECKER, et al., on behalf of themselves
and all other persons similarly situated,
Plaintiffs-Appellants-Petitioners,

v.

SAFEWAY STORES, INC., et al.,
Defendants-Appellees-Respondents.

No. CA 3-77-0360 (N.D. Tex. March 16, 1977)

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, cattle producers and feeders, petition this Court to issue a Writ of Certiorari to review the decision of the Fifth Circuit Court of Appeals filed on August 17, 1979 which held that *Illinois Brick Co. v. Illinois,* 431 U.S. 720 *rehearing denied,* 434 U.S. 881 (1977) bars primary producers of fat cattle from maintaining an action for treble damages under the federal antitrust laws where numerous large supermarket chains, the supermarkets' trade association, a beef commodity reporting service and other unnamed co-conspirators allegedly engaged in monopsonistic or oligopsonistic price-fixing and conspiratorial price depression which caused monetary damage to the business and property of primary producers of fat cattle, unless the action falls within an exception to the application of the rule in *Illinois Brick v. Illinois,* 431 U.S. 720 *rehearing denied,* 434 U.S. 881 (1977). A Petition for Rehearing and a Petition for Rehearing *En Banc* were denied on April 24, 1980.

OPINIONS BELOW

The pertinent Order of United States District Court for the Northern District of Texas is appended at A-53. The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 600 F.2d 1148 (5th Cir. 1979) and is appended at A-1.

The denial of the Petition for Rehearing and Petition for Rehearing *En Banc* is reported at 609 F.2d 1008 (5th Cir. 1980) and is appended at A-49.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered judgment in the above-entitled actions on August 17, 1979, denied the Petitions for Rehearing and Rehearing *En Banc* on April 24, 1980; and the mandate was stayed on May 9, 1980 pending the disposition of this and other Petitions. This Petition seeking determination and relief as provided in 28 U.S.C. § 2106 was filed within ninety days of the denials of rehearing in accordance with 28 U.S.C. § 1254(1) and 28 U.S.C. § 2101(c). The District Court has and had jurisdiction pursuant to 28 U.S.C. 1337(a), 15 U.S.C. §§ 1-2 and 15 U.S.C. §§ 15, 26.

QUESTIONS PRESENTED

1. Does the decision of the United States Supreme Court in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 *rehearing denied*, 434 U.S. 881 (1977) bar fat cattle producers, as *sellers* of fat cattle to packers and slaughterers, from maintaining an action under Section 4 of the Clayton Act for treble damages against supermarket chains and others arising from the sales into a market rigged, in violation of the federal antitrust laws, by the supermarkets, the supermarkets' trade association, a beef-commodity reporting service and other co-conspirators, unless the claims fall within the ambit of an exception to the rule in *Illinois Brick*?

2. Did the United States Court of Appeals for the Fifth Circuit erroneously concluded that the District Court properly dismissed with prejudice Plaintiffs' cause of action for a combination or conspiracy to fix prices (by granting Defendants' Motion to Dismiss for failure to state a claim upon which relief can be granted and Motion for Judgment on the Pleadings [Rules 12(b)(6) and 12(c) of the Federal Rules of Civil

Procedure]), because Plaintiffs' complaints failed to properly allege a conspiracy to fix prices between the named defendants and the unnamed co-conspirators?

3. Did the United States Court of Appeals for the Fifth Circuit erroneously affirm the District Court's denial of Petitioners' Motion for Leave to Amend their Pleadings pursuant to Rule 15 of the Federal Rules of Civil Procedure?

STATUTES AND RULES INVOLVED

The pertinent provisions of the Sherman Antitrust Act, 15 U.S.C. §§ 1-2, the Clayton Act, 15 U.S.C. §§ 15 and 26, and the Federal Rules of Civil Procedure, Rules 8, 12 and 15, are appended at B-1 *et seq.*

STATEMENT OF THE CASE

A. Course of Proceeding and Disposition in Court Below

The actions involved in this Petition are antitrust actions brought by fat cattle producers and feeders against numerous large supermarket chains, the supermarkets' trade association (formerly known as the National Association of Food Chains and now known as the Food Marketing Institute), a beef-commodity reporting service (known as the National Provisioner, Inc., publisher of The National Provisioner Daily Market and News Service, which is commonly known as the "Yellow Sheet"), and other unnamed co-conspirators. The complaints allege that the concerted activities of these defendants violate the provisions of Sections 1 and 2 of the Sherman Antitrust Act (15 U.S.C. §§ 1-2), and damaged the plaintiffs (petitioners herein) by depressing the price of fat

cattle. These actions and other similar actions pending in the Northern District of Texas have been consolidated by order of the Judicial Panel on Multidistrict Litigation for pretrial purposes before the Honorable William M. Taylor, Jr., pursuant to 28 U.S.C. § 1407. *In Re: Beef Industry Antitrust Litigation*, 419 F.Supp. 720 (J.P.M.L. 1976), and subsequent orders pursuant thereto (tag-along cases).

The complaints, as amended, are brought by the plaintiffs for treble damages and for injunctive relief, under Sections 4 and 16 of the Clayton Act (15 U.S.C. §§ 15 and 26). These petitioners, who respectfully petition this Court for the issuance of a Writ of Certiorari, are:

1. *Meat Price Investigators Association, et al. v. Safeway Stores, Inc., et al.* This action was originally filed on December 1, 1975, in the Southern District of Iowa. Meat Price Investigators Association is an Iowa unincorporated association and trust of over 450 individual cattle-raising entities. This action originally named ten supermarket-chain defendants and the two non-chain store defendants. On September 1, 1977, by leave of the District Court, the complaint was amended to name eight additional supermarket defendants.

2. *Ronald Becker, et al., on behalf of themselves and all other persons similarly situated, v. Safeway Stores, Inc. et al.* This action was originally filed in the Southern District of Iowa on August 10, 1976. The plaintiffs presently are five individual fat cattle feeders who propose to bring a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of all persons who are engaged in the business of raising what is commonly known in the cattle business as fat cattle, and who have within the four years immediately preceding the filing of the action, sold more than

100 head of fat cattle in any one year.[1] The defendants to the *Becker* action are identical to the defendants in the *MPIA* action. On September 1, 1977, by leave of the District Court, the *Becker* action was also amended to name eight additional retail food chain stores as defendants.

On June 17, 1977, the defendants filed Motions to Dismiss and for Judgment on the Pleadings pursuant to Rules 12(b)(6) and 12(c) of the Federal Rules of Civil Procedure, and predicated the motions upon this Court's recent decision in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 *rehearing denied*, 434 U.S. 881 (1977).

On September 1, 1977, pursuant to leave of the District Court, the plaintiffs filed Amended and Substituted Complaints in the *MPIA* and *Becker* cases (App. at A-58).

On September 13, 1977, ten of the defendants filed a Motion to Dismiss under Rule 12 of the Federal Rules of Civil Procedure addressed generally to the Amended and Substituted Complaints in *MPIA* and *Becker*. The plaintiffs resisted this motion and the matter came on for hearing before the District Court on September 28, 1977.

On this motion, the District Court dismissed plaintiffs' cases with prejudice by its December 9, 1977 ruling and Order (App. at A-53).

In its ruling and Order of December 9, 1977, the Trial Court therein sustained, without opinion, the defendants' Motion to Dismiss on the basis of *Illinois Brick Co. v. Illinois*, 431 U.S. 720 *rehearing denied*, 434 U.S. 881 (1977), and on January 24, 1978, the Trial Court refused, without stating

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[1] The agricultural census figures compiled by the U.S. Department of Agriculture for the early 1970's indicate that approximately 81% of all fat cattle, is marketed in the United States in 11 of these states by approximately 20% of the producers of fat cattle.

reasons, to allow the plaintiffs leave to further amend their Complaint. A-53 and A-56. The petitioning plaintiffs herein filed timely notices of appeal on February 22, 1978.

On August 17, 1979, the United States Court of Appeals for the Fifth Circuit entered judgment, mandate stayed until June 8, 1980 (App. A-1 through A-48 and A-50), reversing and remanding the consolidated appeals to the District Court for the Northern District of Texas for further proceedings consistent with the following conclusions of the Court:

1. Although the Circuit Court of Appeals agreed with the District Court that the rule of *Illinois Brick* bars the maintenance of a civil antitrust action by the *primary producer-sellers* into a rigged market as indirect *sellers*, the Circuit Court of Appeals held that the Amended and Substituted Complaints stated a cause of action under the "cost-plus exception" to *Illinois Brick;*

2. The Amended and Substituted Complaints fail to allege a conspiracy between and among the supermarkets and other co-conspirators; and

3. The District Court did not abuse its discretion in denying Plaintiffs' Motion to Amend their pleadings pursuant to Rule 15, Fed. R. Civ. Pro.

The Court of Appeals denied Plaintiffs' Petitions for Rehearing and Rehearing *En Banc* on April 24, 1980 and the mandate was stayed on May 9, 1980 pending the disposition of this Petition. App. A-49.

B. Statement of Facts

Plaintiffs in *MPIA* and *Becker*, in their Amended and Substituted Complaints (App. at A-58 through A-101), aver the following facts which are pertinent to the defendants' motions to dismiss:

> (25) Various other companies, firms, associations, and individuals not now made defendants in this Complaint, participated as co-conspirators in the offenses charged herein, and in other concurrent conspiracies in violation of the antitrust laws, which jointly and/or severally and/or concurrently have injured the plaintiffs in their businesses and properties, and performed acts and made statements in furtherance thereof. (*MPIA* and *Becker*, paragraph 25)
>
> (26) Cattle are raised and fed on farms, ranches and feedlots . . . . Cattle are fattened by feeding them a concentrated feed ration for fast growth and fattening until they are ready for slaughter as fat cattle. (*MPIA* and *Becker*, paragraph 26)
>
> (27) A fat steer or heifer is required to be sold within a three-week period of time when the animal reaches choice grade. The cattleman must accept whatever price is given at that time, because retention of the animal results in over-fattening and significant loss of value. Supply of cattle and beef in the short-term is known throughout the industry and is inelastic. (*MPIA* and *Becker*, paragraph 27)
>
> (28) The vast majority of fat cattle are purchased by beef slaughterers and packers directly from cattlemen, although some fat cattle are purchased by beef slaughterers through terminal or auction markets. The direct basis

for the price given plaintiffs . . . by beef slaughterers for fat cattle is a price stated in a publication known as the "National Provisioner Daily Market and News Service" or "Yellow Sheet" for all transactions west of the Rocky Mountains, the "Safeway price." Cattle buyers for beef slaughterers figure the percentage of dressed meat on the live animal and give the cattle feeder a price for the live animal based upon the value of the dressed carcass according to a formula based on the Yellow Sheet or its west coast counterpart, the 'Safeway price.' (*MPIA* and *Becker*, paragraph 28)

(29-30) Beef slaughterers and packers slaughter live cattle and sell edible beef and beef by-products in interstate commerce. . . . A substantial majority of edible beef is sold to retail food chain stores such as the defendants herein. Large food chains buy most beef directly from packers and slaughterers. The wholesale market for choice beef in the United States is established on a weekly basis by the actions of the defendants and other co-conspirators, through their size and monopsony market power and as a result of understandings and agreements among themselves and other retail food chains. (*MPIA* and *Becker*, paragraphs 29-30)

(31) A&P and Safeway, and other co-conspirators at other times and places, negotiate for and buy beef in the wholesale market early in the week, which establishes the wholesale price of beef for the remainder of the defendants and co-conspirator chain stores. The price is established by the major leading chains through the use of their monopsony market power, which is enlarged and enhanced by their understandings and agreements with other defendants and co-conspirators. This action is de-

signed to depress the wholesale price of carcass and boxed beef, which directly controls the price of live cattle. (*MPIA* and *Becker*, paragraph 31)

(32) The weekly pricing decisions of A&P, Safeway and other defendants and co-conspirators are instantly communicated by the wholesale beef trade (including chain store buyers, brokers, breakers, packers and others). The cattleman is not privy to any of this extensive communication among the wholesale beef trade. The weekly market pricing decisions of A&P and Safeway and other defendants and co-conspirators are then reflected in the Yellow Sheet and the west coast "Safeway price." Other co-defendant chain stores and co-conspirators utilize this Yellow Sheet price or "Safeway price" as the contractual basis for the price they will pay beef packers and slaughterers for wholesale beef. (*MPIA* and *Becker*, paragraph 32)

(33) Approximately 80 percent of the choice slaughtered beef in the United States is purchased by formulae, the basis of which is the Yellow Sheet price and the west coast "Safeway price." This use by chain store defendants and co-conspirators of the Yellow Sheet and the "Safeway price" as a tool to communicate price and as a basis for wholesale beef prices, combined with the use of the Yellow Sheet and the "Safeway price" by all major beef slaughterers and packers as a direct basis of prices paid for live cattle, constitutes a direct pass-through of the price established by the defendants chain stores to the cattlemen. (*MPIA* and *Becker*, paragraph 33)

(34[3]) The defendant feed chains and other co-conspirators have agreed not to compete with one another on a price basis in purchasing beef for wholesale. Instead

they have agreed that A&P and Safeway, and other defendants and co-conspirators will utilize the Yellow Sheet or 'Safeway price.' This is for the designed purpose of eliminating price competition for wholesale beef, of increasing the wholesale-retail price spreads for beef and of driving down the price of live cattle. (*MPIA* and *Becker*, paragraph 34[3])

(34) Most slaughterers and packers have standing agreements with various receivers, including the defendant chain stores and other co-conspirators, for certain quantities of beef each week. With knowledge of their weekly requirements and of the prices quoted in the Yellow Sheet or the 'Safeway price,' the packers and slaughterers directly pass down the price established by the defendant retail food chains. The packers and slaughterers in aggregate do not suffer any dimunition of sales, purchases, margins or profits as a result of this artificially low price. (*MPIA* and *Becker*, paragraph 34)

ARGUMENT

A. The Decision In Illinois Brick Does Not Bar Claims of Primary Sellers Into A Rigged Market.

Petitioners assert that the Circuit Court erred in approving the District Court's dismissal *with prejudice*, of the plaintiffs' causes of action under Sections 1 and 2 of the Sherman Act and Section 4 of the Clayton Act on the ground that said causes of action fall within the ambit of the policy prohibitions of *Illinois Brick*.

1. Plaintiffs-Petitioners have Suffered Injuries within the Meaning of Section 4 of the Clayton Act.

The language of Section 4 of the Clayton Act (15 U.S.C. § 15) is broad and inclusive. It provides:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained and the cost of suit, including a reasonable attorney's fee.

The Supreme Court has held that this language makes the act equally as applicable to sellers as to purchasers:

> The statute does not confine its protection to consumers, to purchasers, or to competitors, or to sellers. Nor does it immunize the outlawed acts because they are done by any of these. Cf. United States v. Socony-Vacuum Oil Co. 310 US 150, 84 L ed 1129, 60 S Ct 811; American Tobacco Co. v. United States, 328 US 781, 90 L ed 1575, 66 S Ct 1125. The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated. Cf. United States v. South-Eastern Underwriters Asso. supra (322 US at 553, 88 L ed 1457, 64 S Ct 1162).

Mandeville Island Farms v. American Crystal Sugar Company, 334 U.S. 219 (1948) *rehearing denied.* As sellers, then, petitioners have standing to redress the injury to their "business or property" by the actions of defendants about which plaintiff-petitioners have complained (*See Reiter v. Sonotone*, 442 U.S. 330 [1979]).

2. The Policy Decision Announced in *Illinois Brick* Applies Only to Direct Purchasers Who Have Been Penalized by an Illegal Overcharge.

In *Illinois Brick*, this Court held:

> [T]he longstanding policy of encouraging vigorous private enforcement of the antitrust laws, see, e.g., Perma Life Mufflers, Inc. v. International Parts Corp. 392 US 134, 139, 20 L Ed 2d 982, 88 S Ct 1981 (1968), supports our adherence to the Hanover Shoe rule, under which direct purchasers are not only spared the burden of litigating the intricacies of pass-on but also are permitted to recover the full amount of the overcharge. We recognize that direct purchasers sometimes may refrain from bringing a treble-damages suit for fear of disrupting relations with their suppliers. But on balance, and until there are clear directions from Congress to the contrary, we concluded that the legislative purpose in creating a group of "private attorneys general" to enforce the antitrust laws under § 4, Hawaii v. Standard Oil Co. of California, 405 US, at 262, 31 L Ed 2d 184, 92 S Ct 885, is better served by holding *direct purchasers* to be injured to the full extent of the *overcharge paid* by them than by attempting to apportion the overcharge among all that may have absorbed a part of it.

431 U.S. 745-46 (1977). Emphasis added.

The gravamen of plaintiffs' complaints is, however, that plaintiffs are damaged, not by *payment* of *overcharges*, but by the artificially depressed prices in the market into which they are compelled to sell fungible product. The Amended and Substituted Complaint alleges, that plaintiffs have suffered,

among other things, a "loss of revenues measured by the difference between the artificially depressed price received by plaintiffs and the price they would have received had free market conditions existed." App. A-77. Because there is no allegation of an overcharge to the middlemen by defendant supermarkets, there is no opportunity for defendants to assert a pass-on (of damages) defense. Indeed, should there be an assertion of the "pass-on theory" by the named defendants in this case, said defendants would place themselves in the astounding posture of defending the action by asserting that they did not pay adequate compensation for their supplies of beef.

These causes of action pose no apportionment problem because no *overcharge* has been *paid.* The allegations of the Amended and Substituted Complaint assert a depressed market price for fat cattle. (Amended and Substituted Complaint, paragraph 34 App. A-73). If a pass-on theory of damages were to be asserted by defendants, the allocation problem within the chain of *supply* to the supermarkets becomes a problem of allocating *unpaid* amounts of money, which is an entirely different problem than that addressed in *Illinois Brick.*

The problem addressed by this Court in *Illinois Brick* is what might be termed a "trickle down" problem—a problem of tracing the overcharge to and overpayment by a direct purchaser through successive levels of overcharge and overpayment where, at any of the several levels, all or part of the damages suffered by reason of the *payment* of the overcharge might be absorbed by the payor. In this action, however, there is no "trickle down." The cattlemen, who are selling their perishable product at a conspiratorially depressed price into a market which, in the short term is inelastic, can

neither recoup or pass-on any loss they suffer nor make up that loss by passing on an overcharge because they are the *first sellers* into a rigged market. Therefore, any apportionment of damages will be only among the *first sellers into* the conspiratorially depressed market—not, as in *Illinois Brick*, among various levels of the market itself.

3. Plaintiffs are Direct Sellers into a Market Alleged to be Conspiratorially Rigged.

The nature of the alleged conspiracy itself makes the pass-on rule in *Illinois Brick* inappropriate to this cause. Plaintiffs have alleged that various other companies, firms, associations, and individuals have participated as co-conspirators to rig the market causing illegal depression of the prices paid to producers of fat cattle (App. A-67). Assuming, for the sake of argument, that such a conspiracy existed, it is a combination or conspiracy of the middlemen with the named defendants. Hence, the first parties outside of the conspiracy to deal with the combination or conspiracy and suffer loss therefrom are the plaintiffs.[2]

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[2] *See Reiter v. Sonotone Corp*; Trade Reg. Rep. (CCH) ¶63,212 (1980) *appeal denied* Misc. No. 80-8058 (8th Cir. May 23, 1980) ("When the manufacturers and retailers conspire to fix the prices . . . such competition is foreclosed and the market is no longer competitive. Such price-fixing activities by manufacturers and retailers is a per se violation of Section 1 of the Sherman Act." and further "Because the purchaser, including the plaintiff herein . . . is paying the overcharge directly, no assertion that an overcharge has been passed on to it from another injured party will be necessary to prove the alleged damages.); *Albrecht v. The Herald Co.*, 390 U.S. 145 (1968) held that a newspaper publisher's combination with others for the purpose of forcing a distributor to maintain specified maximum prices for resale of newspapers which he has purchased from the publisher constitutes a combination in restraint of trade under Section 1 of the Sherman Act [15 U.S.C. § 1])

4. Plaintiffs' Claims do not Assert the Offensive Use of the Pass-on Theory under *Illinois Brick*.

The Circuit Court recognizes, at footnote 24 of its opinion, that plaintiffs' theory of damages is not founded on a "pass-on" theory.

> The plaintiffs' theory of damages is not in all respects a pass-on type of theory. Their theory, stated most broadly is that the activities of the alleged price-fixing conspiracy depressed wholesale prices generally, and not simply the prices paid by members of the conspiracy, and that packers and slaughterers based their purchases of live cattle on the depressed wholesale price. It is immaterial whether or not a steer purchased from a plaintiff found its way into the hands of a conspirator retailer. It's enough if, as alleged, the conspirators' activities caused a general depression in wholesale prices and the intermediary purchasing from plaintiff based his pricing decision on the depressed wholesale beef price. . . .

App. A-37, n. 24.

With this incisive observation, the Court has, at once recognized and then ignored that plaintiffs have stated a cause of action under Rule 12 of the Federal Rules of Civil Procedure and within Section 1 of the Sherman Act. That Court also eliminated the problem of apportionment of overcharges paid through the chain of supply and effectively precludes this case from falling within the ambit of *Illinois Brick*.

B. The United States Court of Appeals for the Fifth Circuit Erroneously Concluded that the Petitioners Failed to Allege a Conspiracy or Combination to Fix Prices Between the Named Defendants and Middlemen.

Rules 8(a), (e) and (f) of the Federal Rules of Civil Procedure require only "simplified notice pleading . . ." (*Conley v. Gibson*, 355 U.S. 41, 48 [1957]): "No technical forms of pleadings are required"; and "All pleadings shall be so construed to do substantial justice."

Plaintiff-Petitioners' First Amended and Substituted Complaints allege:

> 25. Various other companies, firms, associations, and individuals not now made defendants in this Complaint, participated as co-conspirators in the offenses charged herein, and in other concurrent conspiracies in violation of the antitrust laws, which jointly and/or severally and/or concurrently have injured the plaintiffs in their businesses and properties, and performed acts and made statements in furtherance thereof.
>
> and
>
> 34. Most slaughterers and packers have standing agreements with various receivers, including the defendant chain stores and other co-conspirators, for certain quantities of beef each week. With knowledge of their weekly requirements and of the prices quoted in the Yellow Sheet of the "Safeway price," the packers and slaughterers directly pass down the price established by the defendant retail food chains. The packers and slaughterers in aggregate do not suffer any diminution of sales, purchases, margins or profits as a result of this artifically low price.

It is axiomatic that when a complaint is the subject of motions under Rules 12(b)(6) or 12(c) of the Federal Rules of Civil Procedure, the Court must take all allegations in the complaint as true, together with all inferences and intendments thereto; only if there is *no set* of facts under which the plaintiffs could recover, should the Court grant a dismissal with prejudice. *Cruz v. Beto*, 405 U.S. 319, 322 (1972); *Walker Process Equip. v. Food Mach. Chem. Corp.*, 382 U.S. 172, 175 (1965); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Furthermore, a plaintiff suing under the federal antitrust laws is not required to sue all members of the combination or conspiracy. *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230, 1244 n.42 (3d Cir. 1975); *National Wrestling Alliance v. Myers*, 325 F.2d 768, 775 (8th Cir. 1963); *Walker Distributing Co. v. Lucky Lager Brewing Co.*, 323 F.2d 1, 8 (9th Cir. 1963); *City of Atlanta v. Chattanooga Foundry & Pipeworks*, 127 F. 23 (6th Cir. 1903) *aff'd*, 203 U.S. 390 (1906).

When viewing the Amended and Substituted Complaints in the light most favorable to the plaintiffs, giving the plaintiffs the benefit of all reasonable intendments and inferences thereto and liberally construing the same, the Amended and Substituted Complaints support a finding that a conspiracy in violation of the antitrust laws has existed between the defendant supermarkets and middlemen which depressed fat cattle prices—the target of which has been the cattle producer. The Amended and Substituted Complaints allege that other coconspirators and other concurrent conspiracies have jointly and/or severally and/or concurrently injured plaintiffs in their businesses and properties and performed acts and made statements in furtherance thereof. (*Supra* at A-25).

Further, the Complaints allege that the packers and slaughterers had standing agreements for fixed quantities of beef from the named defendants and that they established the price paid to the plaintiffs through the use of the "Yellow Sheet." (*Supra* at A-71).

It is well established that "a vertical combination or combination of non-competitors may conspire to restrain unreasonably the interstate trade and commerce of third parties and thereby subject themselves to the prohibitions of the Sherman Act." *United States v. General Motors Corp.*, 121 F.2d 376, 404 (7th Cir. 1941), *cert. denied*, 314 U.S. 618, *rehearing denied*, 314 U.S. 708 (1941). Indeed, *United States v. Parke, Davis & Co.*, 362 U.S. 29, 45 (1960), involved a three-tier conspiracy among manufacturer, wholesalers, and retail sellers aimed at retail purchasers. Further, it is well established that facts similar to those alleged in these Amended and Substituted Complaints can establish a combination and conspiracy in restraint of trade and a combination to monopolize aimed at producers such as the plaintiff fat cattle producers (*American Tobacco Co. v. United States*, 328 U.S. 781 [1946]; *Swift & Co. v. United States*, 196 U.S. 375 [1905]), and such allegations give rise to a private damage action under Section 4 of the Clayton Act by producers such as the plaintiffs. *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219 (1948).

Therefore, the United States Court of Appeals for the Fifth Circuit erred in holding that Plaintiffs' Amended and Substituted Complaints did not allege a combination or conspiracy between and among the named defendants and their unnamed co-conspirators..

C. The United States Court of Appeals for the Fifth Circuit Erroneously Affirmed the United States District Court's Denial of Plaintiffs' Motion for Leave to Amend their Pleadings.

Rule 15(a) of the Federal Rules of Civil Procedure (App. at A-105) provides that the Trial Court shall freely grant leave to amend the pleadings "when justice so requires." As stated by this Court, "this mandate is to be heeded." *Foman v. Davis*, 371 U.S. 178, 182 (1962). *Accord, Lone Star Motor Import, Inc. v. Citroen Cars Corp.*, 288 F.2d 69 (5th Cir. 1961).

Although the District Court concluded that the actions were appropriately dismissed with prejudice under *Illinois Brick* and that "justice does not require leave to amend" (App. at A-56), the District Court failed to make any findings to support its conclusions.

> [T]he grant or denial of an opportunity to amend is within the discretion of the District Court, *but outright refusal to grant leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion* and inconsistent with the spirit of the Federal Rules. (Emphasis added.)

Foman v. Davis, 371 U.S. 178, 182 (1962). *Accord, Griggs v. Hinds Junior College*, 563 F.2d 179 (5th Cir. 1977); *Scott v. Eversole Mortuary*, 522 F.2d 1110 (9th Cir. 1975); *Sarter v. Mays*, 491 F.2d 675 (5th Cir. 1974).

Even though the District Court provided no reasons for its refusal to allow the plaintiffs leave to amend, the Circuit Court affirmed the refusal upon its independent conclusions that there was undue delay and amendment would be futile.

The Circuit Court erred in concluding that there was undue delay in the absence of supportive findings that indicate that the defendants are prejudiced thereby. *Griggs v. Hinds Junior College*, 563 F.2d 179 (5th Cir. 1977); *Lone Star Motor Import, Inc. v. Citroen Cars Corp.*, 288 F.2d 69 (5th Cir. 1961). The Circuit Court also erred in concluding that granting leave to amend would be futile because: *Illinois Brick* applies to *overcharges paid* by purchasers—not to *sellers* into a rigged market; plaintiffs are not required to sue all co-conspirators; and "[t]he plaintiffs' theory of damages is not in all respects a pass-on type of theory" (Circuit Court Opinion, App. at A-37 n. 24).

> Granting leave to amend is especially appropriate, in cases such as this, when the trial court has dismissed the complaint for failure to state a claim.

Griggs v. Hinds Junior College, 563 F.2d 179, 180 (5th Cir. 1977). The Circuit Court recognized, in holding that Plaintiffs had stated a claim under the "cost-plus" exception to *Illinois Brick*, that there are facts, if proved, that would allow plaintiffs to recover under the antitrust law of the United States.

> If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits.

Foman v. Davis, 371 U.S. 178, 182 (1962). Therefore, the Circuit Court erred in affirming the District Court's denial of plaintiffs' Motion for leave to amend their pleadings to include an alternate theory of recovery.

CONCLUSION

In the interest of protecting the primary producers of fungible agricultural products by ensuring the existence of a free and competitive marketplace, the Petitioners respectfully request that this Court grant Petitioners' Petition for a Writ of Certiorari in these causes of actions.

Dated: June 6, 1980.

Respectfully submitted,

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